IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

CRIMINAL APPEAL NO. 847 OF 2005

IN

POTA SPL CASE NO. 2 OF 2003

ARIF HUSSAIN SABIR HUSSAIN
@ PANN WALA .. Appellant.

vs.

The State of Maharashtra. .. Respondent.

Mr. S.R. Chitnis, Sr. Counsel with Mr. Sharif Shaikh for Appellant.

Mr. S.R. Borulkar, P.P. with Mr. D.S. Mhaispurkar, APP., for State.

CORAM : J.N. PATEL, AND
SMT. ROSHAN DALVI, JJ.
DATE : 26th June, 2006.

ORAL JUDGMENT (PER J.N. PATEL, J.)

. This is an appeal preferred by the original accused no. 11 who is facing trial in POTA Special Case No. 2 of 2003 before the Special Judge under POTA impugning the order dated 25th July, 2005 passed by the learned Special Judge rejecting his application for bail.

2. We have heard Mr. S.R. Chitnis, Senior Advocate and Mr. S.R. Borulkar, Public Prosecutor and gone through the record made available to us in this appeal.

3. After taking into consideration the impugned order we are of the view that the Special Judge has summarily rejected the second application for bail on the ground that the earlier Application being Bail Application NO. 17 of 2004 filed by the appellant was rejected by the trial Court against which Criminal Appeal No. 99 of 2005 was filed before this Court which came to be withdrawn and the Court disposed of the appeal by passing the following order :-

"Allowed to be withdrawn."

The Special Judge also found that as there was no liberty granted to the applicant to file fresh application in any court, it would be not proper for judicial discipline to entertain the bail application. Under such circumstances when on earlier occasion an application came to be rejected on merits and the same was challenged in appeal which was withdrawn and, therefore, the learned Special Judge did not examine the bail application afresh by going into the merits of the said application and rejected it.

4. This, according to us, was not proper for the very reason that there is no legal impediment in the way of any accused facing trial under POTA to file fresh application even if his earlier application is rejected and the Court is bound to consider it on its own merits keeping in mind the settled law that the second application for bail can be taken up for consideration if it is pointed out to the trial Court that there has been substantial change in circumstances which calls for fresh look to the case of the applicant so as to consider whether he deserves to be released on bail or not.

5. Therefore, without going into the merits of the matter, we propose to dispose of this appeal with the direction to the Special Judge to consider the fresh application filed by the appellant on merits.

6. Mr. Chitnis, the learned Senior Advocate, drew our attention to the observation made by us while admitting this appeal particularly that we will not put the appellant to the inconvenience of reverting back to the Special Court as he has already exhausted two rounds and that this application for bail could be considered by us on the basis of the judgement rendered in Navjot Sandhu’s case.

7. According to us, these observations came to be made at the time of admission and as we are dealing with the matter in appeal against an order which is not passed on merits, there is nothing before us to consider as to whether the impugned order passed by the trial Court calls for interference.

8. Mr. Chitnis fairly conceded that the decision in Navjot Sandhu's case **(State (N.C.T. of Delhi) Vs. Navjot Sandhu,** reported in 2005 ALL MR (Cri) 2805 (S.C.) and the subsequent decision on the issue has come in existence after the trial Court summarily rejected his application for bail.

9. Therefore, it will be just and proper that the impugned order is quashed and set aside and the matter is remitted to the Special Judge to hear the application afresh in light of decision of this Court as well as the Supreme Court on the issues raised by the appellant on the basis of material collected against the appellant which forms part of the charge-sheet.

10. Mr. Chitnis made a specific mention of the interpretation of Section 32 (1) of POTA made by Division Bench of this Court in the case of **Mohammad Gausuddin s/o. Wali Mohammad Vs. State of**

Maharashtra, reported in 2003 ALL MR (Cri) 1107, a Full Bench decision in the matter where this Court disposed of group of petitions filed on the said issue i.e. **Saquib Abdul Hameed Nachan Vs. The State of Maharashtra and others** Criminal Writ Petition No. 1742 of 2004 decided on 5th November, 2004 as that is having direct bearing on the merits of the case of the appellant for the reason that according to Mr. Chitnis the only material against the appellant is in the form of confession of co-accused and the telephone calls received by him from the cell phone of one of the absconding accused.

11. Mr. Chitnis has also drawn our attention to the decision of the Supreme Court of India in the case of **Kirtibhai Madhavlal Joshi Vs. State of Gujarat and others** in Criminal Appeal No. 384 of 2006 which has been decided on 4th April, 2004 wherein the Supreme Court has dealt with the provisions of Section 49 of POTA. Mr. Chitnis submitted that this is in the back-drop that the appellant accused is in custody for more than three years.

12. We are also informed that one of the co-accused has also preferred a SLP (Criminal) before the Supreme Court challenging the clubbing of the three cases of Bombay Blast and trying them as

one by the State in filing a common charge-sheet i.e. relating to the bomb explosion which took place on 6th December, 2002 at Hotel McDonald situated at Mumbai Central Railway Station, the bomb explosion which took place on 27th January, 2003 at Moghibai Road, opp. Polydate Matching Centre, Vile Parle (E), Mumbai and the third one which took place on 13th March, 2003 at Mulund Railway Station in Karjat local train and according to Mr. Chitnis the Supreme Court has granted interim stay to the proceedings before the trial Court. The anxiety expressed by Mr. Chitnis is that because of the pendency of the SLP (Criminal) before the Hon'ble Supreme Court and the interim order of stay, the trial Court may not entertain the application of the appellant. Mr. Chitnis makes a statement that the stay granted by the Supreme Court is only in respect of proceeding with the trial but it has not in any manner prevented the trial Court from entertaining the application for bail.

13. We, therefore, quash and set aside the impugned order and direct the trial Court to consider the second application filed by the appellant-accused afresh. Needless to say that the trial Court would decide the application on merits without being influenced by its earlier order and in light of the decisions cited by Mr. Chitnis and on considering the material against the

appellant-accused.

14. Mr. Chitnis submitted that in view of the fact that the appellant-accused is languishing in jail for about three years, his application for bail be directed to be considered expeditiously. We find that this request on the part of Mr. Chitnis, learned Senior Advocate, is reasonable and, therefore, we direct the trial Court to take up the application for hearing as expeditiously as possible and preferably within one month from the date the order is communicated to the trial Court by the learned counsel for the appellant. The appeal stands disposed of accordingly.

(J.N. Patel, J.)

(Smt. Roshan Dalvi, J.)